IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

Office-Supreme Court, U.S.
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No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT MOTION TO DISMISS OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

and

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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MOTION TO DISMISS

Pursuant to Revised Rule 16 of this Court, Appellees State Corporation Commission of the State of Kansas[1] and Southwest Kansas Royalty Owners Association[2] move to

1. Hereinafter called Commission.
2. Hereinafter called Landowners.

dismiss this appeal because the judgment of the Kansas Supreme Court rests on adequate nonfederal bases, the federal questions sought to be reviewed were not timely or properly raised and no substantial federal question is presented.

OPINION BELOW

The Opinion of the Kansas Supreme Court is reported at 192 Kan. 29, 386 P.2d 288.[3]

JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

Whether the judgment of the Kansas Supreme Court rests on adequate nonfederal grounds, whether the federal questions sought to be reviewed were timely and properly raised and whether any substantial federal question is presented

STATEMENT OF THE CASE

This appeal involves gas proration orders issued by the Commission for the Kansas Hugoton Field. The proration orders are addressed and directed solely to producers—not purchasers—and fix the maximum amount of gas that can be produced from each well. They are permissive orders and do not require any producer to produce any gas.

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3. Reproduced in Appendix A to Jurisdictional Statement

Appellant has appealed from Kansas Supreme Court Cases Nos. 42,175, 42,176, 42,185 and 42,230 (Consolidated by the Kansas Supreme Court)[4] and 42,038, each of which involved separate proceedings in the District Courts of Finney and Stevens Counties, Kansas. It will be necessary to outline the various proceedings in each District Court and the various judgments of each District Court involved in the various appeals to the Kansas Supreme Court.

A. Consolidated Cases.

These cases were initiated by Appellant and others in the Finney County Court to review various proration orders. The Trial Court rejected Appellant's contentions based on federal questions and entered judgment accordingly (192 Kan. 29, 386 P.2d 288; Appendix A to Jurisdictional Statement).

Appellant appealed such judgment to the Kansas Supreme Court. Appellant totally abandoned such federal questions and relied exclusively on non-federal questions in the Supreme Court of Kansas[5] (Nos. 42,175, 42,176, 42,185 and 42,230, Abstract of the Record of Appellants Northern Natural Gas Company *et al.*, 292-3).

Appellant's appeal was dismissed by the Kansas Supreme Court on the nonfederal ground that, under the Kansas Judicial Review Act,[6] the "District Court of Finney

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4. Hereinafter called consolidated cases.

5. Appellant's brief and reply brief only discuss nonfederal questions.

Appellant's requested conclusions of law do not even mention the Natural Gas Act (15 U.S.C. §717) or the Federal Constitution (Nos. 42,175, 42,176, 42,185, 42,230 and 42,038, Findings of Fact and Conclusions of Law Requested by Appellant Kansas-Nebraska Natural Gas Company, Inc., 10-4).

6. G.S. Kan., 55-606.

County was without jurisdiction" (192 Kan. at 35, 386 P.2d at 292; Appendix A to Jurisdictional Statement).

B. Case No. 42,038.

The Landowners initiated this case in the Stevens County Court to review the same proration orders involved in the consolidated cases. Prior to trial, the Stevens County Court was informed that Appellant had, after the commencement of the Stevens County proceedings, filed petitions to review the same proration orders in the Finney County Court. The Stevens County Court ordered Appellant to present its grievances concerning such proration orders to the Stevens County Court (No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 230-6, 239-43).

Appellant refused to follow the Court's order. The day before trial it filed a motion reciting that it appeared specially to challenge the Court's jurisdiction solely on nonfederal grounds. Appellant never presented this motion to the Court for determination. It did not appear or participate in the Stevens County proceedings. After that Court entered judgment, Appellant appealed to the Kansas Supreme Court (*Supra* at 241-2, 244-5, 333-6).

Appellant did not include any federal questions in its specification of errors to the Kansas Supreme Court. In that Court, Appellant relied solely on alleged errors based on state questions and failed to urge any federal questions.[7] The Kansas Supreme Court rejected Appellant's nonfederal specification of errors and affirmed the judgment of the Stevens County Court (No. 42,038, Abstract of Appellant Kansas-Nebraska Gas Company, Inc., 57-90; 192 Kan. 29, 386 P.2d 288; Appendix A to Jurisdictional Statement).

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7. Authorities cited note 5, *supra*.

ARGUMENT

I. The Judgment of the Kansas Supreme Court Dismissing Appellant's Appeal in the Consolidated Cases Because the Trial Court Lacked Jurisdiction Is an Adequate Nonfederal Basis for Such Judgment and Precludes Review by This Court.

The Kansas Supreme Court held that the Stevens County Court had exclusive jurisdiction to review these proration orders and dismissed Appellant's appeal in the consolidated cases on the purely nonfederal ground that the Finney County Court did not have jurisdiction under the Kansas Judicial Review Act.[8]

This Court does not review state court judgments based on adequate nonfederal grounds:

> "this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds [Citations omitted]" *Fay* v. *Noia*, 372 U.S. 391, 428.

Other cases recognizing this rule are *Buck* v. *California*, 343 U.S. 99; *Nickel* v. *Cole*, 256 U.S. 222; and cases cited therein.

The judgment of the Kansas Supreme Court rests on an adequate nonfederal basis and is not subject to review by this Court.

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8. G.S. Kan., 55-606.

II. There Are No Federal Questions Involved in This Appeal Because Appellant Did Not Timely and Properly Raise Such Questions in the Lower Courts.

Appellant did not timely and properly raise any federal questions in the lower courts. Consequently, no federal questions are properly presented to this Court.

In Case No. 42,038, Appellant did not appear in the Trial Court and obviously did not raise the federal questions.[9] It did not include federal questions in its specification of errors to the Kansas Supreme Court[10] and never raised federal questions in that Court.[11]

In the consolidated cases, Appellant abandoned federal questions in its brief to the Kansas Supreme Court.[12] It did not raise any federal questions in its requested conclusions of law.[13]

This Court does not consider federal questions that were not presented to the lower court.

In *Puget Sound Power & L. Co.* v. *King County*, 264 U.S. 22, this Court held that:

"No evidence appears in the record that it raised an objection based on the 14th Amendment to the Federal

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9. The Kansas Supreme Court does not consider questions that were not presented to trial court (*Karle* v. *Board of County Commissioners*, 188 Kan. 800, 366 P.2d 241).

10. The Kansas Supreme Court does not consider questions that are not included in Appellant's specification of errors (*Jeffers* v. *Jeffers*, 181 Kan. 595, 313 P.2d 233).

11. Authorities cited note 5, *supra*.

12. Specifications of errors that are not discussed in the brief are deemed abandoned and are not considered by the Kansas Supreme Court (*State* v. *Scott*, 156 Kan. 11, 131 P.2d 664).

13. Authorities cited note 5, *supra*.

> Constitution or any other Federal question in the superior court or supreme court. It is too late . . . to raise it in the assignment of errors in this court, even though it joins in the assignment with the street railway company, which did raise such an objection in all the courts" 264 U.S. at 25.

In *Edelman* v. *California*, 344 U.S. 357, this Court refused to review federal questions that had not been raised in the state court in the manner required by state law:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of State law. [Citations omitted] Noncompliance with such local law can thus be an adequate state ground for a decision below." 344 U.S. at 358.

Appellant refused to raise any federal questions in the lower court.[14] It cannot resurrect them in this Court.

III. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act.

The above discussion demonstrates that no federal questions are properly presented and these appeals should be disposed of accordingly. However, due to the fact that imaginative counsel, aided in no small part by a voluminous record, has distorted this appeal to the point that the Commission has been accused of engaging in some sort of unlawful scheme, we feel compelled to briefly mention the merits of this appeal.

Appellant concedes that a state can prorate gas when necessary to prevent waste or protect correlative rights.

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14. It is interesting to note that Appellant's assertion that the federal questions it now wants to raise were "urged upon the Kansas Supreme Court" (Jurisdictional Statement, 5) is not supported by any citations to the record.

It contends however, that the proration orders involved in these proceedings were not made for the purpose of preventing waste or protecting correlative rights and therefore, they violate the Federal Law.

The record before the Kansas Commission contains extensive expert testimony on the technical phase of waste prevention and protecting correlative rights. The record is conclusive that the proration orders involved in these proceedings were necessary and designed to prevent physical waste of natural gas and to protect the correlative rights of the landowners and leasees.

It was evident from this investigation that unless the gas from the Hugoton Field was produced at a rate in excess of the rate it was then being produced 70% to 80% of the 4,000 wells in the field would ultimately fail due to pipe corrosion. The corrosion of pipe would permit otherwise recoverable gas to be lost. Pipe corrosion permitted the encroachment of water into the producing formation causing permanent damage to the reservoir. Wells that failed due to corrosion would ultimately have to be replaced with expensive new wells or the gas would be lost.[15]

The instances of pipe failure due to corrosion greatly increased with the age of the wells. To reduce pipe failures and the resulting loss of gas the field had to be produced at a more reasonable and realistic rate. The evidence clearly showed that the slow rate of production and the resulting loss of gas due to pipe corrosion resulted from the methods followed by the Kansas Commission in determining the market demand for the field and in calculating the

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15. Nos. 41,515 and 41,516, Abstract of the Record, 71, 77-8, 84-6, 90, 92-3, 98, 272; Nos. 41,555 and 41,556, Appellant's Abstract of the Record, 24, 41; No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 78, 101.

allowables for the wells. If waste is caused by unwarranted limitation of production the correction of such a limitation is certainly a waste prevention measure.

Appellant's contention that these proration orders violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution were rejected by this Court in *Cities Service Gas Company* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. There the Oklahoma Commission ordered an interstate purchaser to buy gas and fixed the price to be paid. Cities Service Gas Company made the same constitutional arguments that appellant now advances. This Court disposed of these contentions in short order.

In answering the Fourteenth Amendment argument, this Court held that:

> "[t]he Due Process and Equal Protection issues raised by Appellant are virtually without substance" 340 U.S. at 185.

The argument concerning the Commerce Clause did not fare much better:

> "It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce" 340 U.S. at 186.

Appellant concedes that the power of the state to issue proration orders "is no longer questioned",[16] but argues that, in some manner, when the Commission issued these orders it invaded the jurisdiction of the Federal Power Commission. While we have difficulty understanding this selfcontradictory argument, we do not think that Appellant seriously suggests that the overwhelmingly complicated

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16. Jurisdictional Statement, 26.

task of prorating gas for all states should be turned over to the Federal Power Commission.

The Federal Power Commission does not think that it has the power to issue proration orders. In *Reserve Oil and Gas Co., et al.*, Docket Nos. G-4720, *et al.*, issued April 2, 1964, the Federal Power Commission stated that:

> "[petitioner's] contentions in effect are that this Commission should perform the functions of prorating takes and adjusting correlative private rights of producers within a field; matters which it seems to us should be decided by the Commonwealth of Kentucky. . . ."[17]

This position is in accord with the decisions of this Court. In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this Court noted that:

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interest of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas" (Footnotes omitted). 337 U.S. at 509-13.

In the footnote to the above quotation, this Court said, "See, for example, Kansas Gen. Stat. C. 55 §§ 701713. . . ."[18]

This Court also made it clear that the states retained this power in *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, when it stated that:

> "The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking" 372 U.S. at 94.

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17. Rehearing granted on other issues.

18. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513, n. 17.

In the footnote to the above quotation, this Court noted that "the availability of regulatory alternatives, particularly in the form of proration and similar orders directed at producers, has been much discussed."[19]

Appellant apparently contends that the Federal Power Commission must be given the power to prorate gas because the Kansas proration orders will cause conflicts to arise among state proration agencies and with the Federal Power Commission.[20] Not only does this argument do violence to the very plain and well known Congressional intent that the states should retain power to prorate gas,[21] but it also overlooks the fact that the orders here under review were issued more than eight (8) years ago. There has been no conflict among the states or with the Federal Power Commission. There has been no interference with interstate sales or transportation of gas. Appellant's speculation as to possible conflicts is contrary to the facts.

The Congressional mandate that the states should retain control over the production of natural gas has been recognized by this Court on many occasions. The heart and soul of such regulation are proration orders. If, as Appellant suggests, the states do not have this power, there is no area whatsoever left for state regulation. To say the least, this would do violence to the very clear statement that

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19. *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, 94, n. 12.

20. Jurisdictional Statement, 29-30.

21. Many states were prorating gas when the Natural Gas Act was passed (See, Murphy, Conservation of Oil & Gas, A Legal History, 1948) and, prior to passage, Congress was assured that the Act "takes no authority from State Commissions as it is so drawn as to complement and in no manner usurp State regulatory authority" (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2).

the Natural Gas Act does not cover "the production . . . of natural gas" [22]

This appeal does not present any substantial federal question and should be dismissed.

CONCLUSION

The judgment of the Kansas Supreme Court rests on adequate nonfederal grounds. No federal questions were properly raised by the Appellant. The judgment of the Kansas Supreme Court does not involve a substantial federal question.

Appellees' motion should be granted and the appeals dismissed.

Respectfully submitted,

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22. 15 U.S.C. §717b.